93-1066

Supreme Court, U.S.
JAN 3 1994

No. -

In The

# Supreme Court of the United States

October Term, 1993

JEANNETTE SAULPAUGH and
GREGORY M. SAULPAUGH,

*Petitioners,*

*vs.*

MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, JR., Individually and as Executive Administrator,

*Respondents.*

APPEAL I

**[Caption Continued on Reverse]**

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JEANNETTE SAULPAUGH and
GREGORY M. SAULPAUGH,

*Petitioners,*

and

EMMELYN LOGAN-BALDWIN, ESQ., Attorney for Petitioners, A Real Party in Interest,

*Petitioner,*

*vs.*

MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, JR., Individually and as Executive Administrator,

*Respondents.*

APPEAL II

## QUESTIONS PRESENTED

1. Should this Court resolve the conflict among the circuits about its decision in Connick v. Myers, 461 U.S. 138 (1983) by ruling that a public employee who is retaliated against for complaining of sexual harassment states a claim for violation of her/his First Amendment rights?

2. Did the Second Circuit overlook and/or misapply Supreme Court precedent for setting attorney fees in civil rights cases when it affirmed the District Court's denial of attorney fees and costs, in part, to the Saulpaughs and when it denied the Saulpaughs attorney fees and costs on appeal even though the Saulpaughs are prevailing parties on appeal?

3. Did the Second Circuit err in

permitting the District Court to deny Mrs. Saulpaugh, a prevailing plaintiff, a portion of her "make whole" relief (compound interest on her lost wages) by characterizing "delay" in the case as Saulpaughs' fault when there is no factual basis to attribute any "delay" to the plaintiffs or their attorney?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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JEANNETTE SAULPAUGH and
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Petitioners

APPEAL I

v

MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, JR., Individually and as Executive Administrator,

Respondents

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JEANNETTE SAULPAUGH and
GREGORY M. SAULPAUGH,

Petitioners

APPEAL II

and

EMMELYN LOGAN-BALDWIN, ESQ.,
Attorney for Petitioners
A Real Party in Interest,

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MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as

Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, JR., Individually and as Executive Administrator,

Respondents

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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Petitioners Jeannette Saulpaugh and Gregory M. Saulpaugh (Saulpaughs) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceedings on August 27, 1993.

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Second Circuit issued on August 27, 1993 is reported at ____F.2d.____ (2nd Cir. 1993), 62 EPD Para. 42,540 and is reprinted in the Appendix attached hereto

at 1a, infra.

The Second Circuit denied Saulpaughs' Petition for Rehearing and Suggestion for Rehearing in banc by decision filed October 7, 1993. The decision is reprinted in the Appendix at 64a, infra. The Court denied Saulpaughs' motion for attorney fees on appeal without comment or opinion in an order filed October 15, 1993. The order endorsed on the motion form is reprinted in the Appendix at 66a, infra. The supporting affidavit on the attorney fee motion is reprinted, without the supporting exhibits, in the Appendix at 73a, infra.

## JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. §1331, 42 U.S.C. 1983 and 42 U.S.C. §2000(e) et seq. The decision of the Court of Appeals

sought to be reviewed was issued on August 27, 1993. A timely petition for rehearing was filed on September 10, 1993. The petition for rehearing was denied by order of the Court of Appeals on October 7, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## PERTINENT STATUTES

The Saulpaughs' claims in issue on this petition arise under 42 U.S.C. §1983, the First Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq., and 28 U.S.C. 1927.

**42 U.S.C. § 1983 Civil Action for Deprivation of Rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**United States Constitution - First Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Title VII - 42 U.S.C. §2000(e)5(g)(1) Injunctions-Reinstatement-Back Pay**

If the court finds that the respondent

has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated

against shall operate to reduce the back pay otherwise allowable.

**Title VII - 42 U.S.C. §2000(e)5(k) - Attorney Fees and Costs**

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

**28 U.S.C. §1927 Counsel's Liability for Excessive Costs**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be re-

quired by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

## STATEMENT OF THE CASE

The Saulpaughs appealed to the Second Circuit the denial to Mrs. Saulpaugh of "make whole" relief upon the District Court's finding that she had been sexually harassed and retaliated against for complaining of sexual harassment in violation of Title VII. They sought reinstatement of Section 1983 and New York State statutory and common law claims which the District Court dismissed on the merits and/or refused to entertain pendent jurisdiction, pre-trial. Respondents (MCH) cross appealed claiming the court erred in its liability decision. The Circuit affirmed the Title VII liability decision

in Mrs. Saulpaugh's favor, reinstated all of the Section 1983 claims except her First Amendment claim, reinstated and rejoined all of the severed state claims and directed the District Court to recalculate Mrs. Saulpaugh's lost wages with compound interest. But the court suggested that the District Court could deny Mrs. Saulpaugh interest due if it made a finding that she caused delay in the case. In affirming the District Court's attorney fee decision denying fees and costs in part, the Circuit overlooked application of established precedent for setting attorney fees in civil rights cases.

## REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ABOUT ITS DECISION IN CONNICK V. MYERS, 461 U.S. 138 (1983) BY RULING THAT A PUBLIC EMPLOYEE WHO CLAIMS RETALIATION FOR COMPLAINING OF SEXUAL HARASSMENT/ RETALIATION STATES A CLAIM FOR VIOLATION OF HER/HIS FIRST AMENDMENT

RIGHTS.

A. The Circuit Misapplied First Amendent Law When It Found That Mrs. Saulpaugh Was Not Speaking On Matters of Public Concern When She Complained of Sexual Harassment and Retaliation by Her Public Employer.

The Circuit's decision that Mrs. Saulpaugh's speech was not a matter of public concern, and thus not a basis for a constitutional cause of action should be reversed.[1] Speaking about sexual harassment/retaliation by a public employer is a matter of public concern.

This Court's ruling in Connick v. Myers, 461 U. S. 138 (1983) does not suggest

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1. The Circuit's decision is attached as Appendix A, 1a, infra.

otherwise.[2] Chief Judge Newman of the Second Circuit in his separate opinion reaches this conclusion. Were he not constrained by Second Circuit precedent in Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991), cert. denied 112 S. Ct. 657 (1991) he would have sustained Mrs. Saulpaugh's First Amendment claims, relying on Connick. See Appendix, 47a-53a.

Chief Judge Newman discusses the conflict between the Fifth, Second and Seventh Circuits. He correctly concludes that the Fifth Circuit position is the better approach; he criticizes the Second Circuit

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2. Mrs. Saulpaugh's claims are actionable under Connick because her dismissal was no ordinary dismissal from government service. Mrs. Saulpaugh's dismissal has been found to violate Title VII - her dismissal violates an "applicable statute." Connick v. Myers, supra at 146.

for its unreasoned and hasty adoption of the Seventh Circuit position.

Chief Judge Newman recognizes that a person can be speaking both as an employee and as a citizen. However, the Second and Seventh Circuits[3] artificially divide speech into either matters of public concern or matters of private concern.

Title VII was enacted to implement the

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3. The Seventh Circuit has also held that retaliation by a public employer against a public employee for filing sex discrimination charges does not violate the First Amendment. Yatvin v. Madison Metropolitan School District, 840 F.2d 412, 419 (7th Cir. 1988). This limited view of the First Amendment and of the public benefits of bringing charges of discrimination/retaliation should not be the law of any Circuit or of the land. Public awareness of the laws against sexual harassment/retaliation has grown in recent years in large part because women like Mrs. Saulpaugh have complained. This kind of speech must be fully protected by the Constitution; no penalty for such speech should be tolerated.

national policy of eradicating discrimination/retaliation. This Court has recognized that plaintiffs act in the role of "private attorney general[s]" who are "vindicating a policy 'of the highest priority'" by prosecuting discrimination/retaliation complaints. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). Violation of this important remedial statute is a matter of public concern.

Persons should be protected by the Constitution when they speak about discrimination/retaliation by public employers, regardless of whether they are speaking about their own experiences of discrimination/retaliation or harassment. The Connick court noted that "[Plaintiff's] right to protest racial discrimination - a matter inherently of public concern - is not forfeited by her choice of private

forum." Connick, supra, 461 U.S. at 148 n. 8 citing Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-416 (1979). Likewise, complaining about sexual harassment/retaliation is "inherently a matter of public concern;" there should be no less legal protection for victims of sexual harassment/retaliation. This is an issue of exceptional importance. The petition should be granted.

## II. THE SECOND CIRCUIT OVERLOOKED AND/OR MISAPPLIED SUPREME COURT PRECEDENT FOR SETTING ATTORNEY FEES IN CIVIL RIGHTS CASES WHEN IT AFFIRMED THE DISTRICT COURT'S DENIAL OF ATTORNEY FEES AND COSTS, IN PART, TO THE SAULPAUGHS AND WHEN IT DENIED THE SAULPAUGHS ATTORNEY FEES AND COSTS ON APPEAL EVEN THOUGH THE SAULPAUGHS ARE PREVAILING PARTIES ON APPEAL.

Petitioners believe that the Circuit has (1) misunderstood and/or misapplied their retainer agreement (2) overlooked and/or

misapplied Supreme Court and Circuit precedent on setting attorney fees for prevailing plaintiffs in civil rights cases and (3) misunderstood and/or misapplied the litigation management plan agreed to by counsel for all parties and approved by the District Court after the court severed and dismissed all of plaintiffs' pendent state claims in 1986. These are questions of exceptional importance. This Court should grant certiorari.

A. The Retainer Agreement Provides for Market Rates on Successful Conclusion of the Litigation.

The District Court and apparently the Circuit read the Saulpaugh retainer agreement (A. 2934, 3047-48) to provide a billing rate of $80.00 per hour. This is incorrect. The $80.00 per hour rate is a

reduced hourly rate owed by the Saulpaughs if they lose. If the Saulpaughs are successful, as they indeed are, their counsel is entitled to her regular, hourly billing rates.

This partially contingent retainer facilitates ordinary wage earners affording experienced counsel to pursue difficult employment litigation. The attorney bears the risk of being inadequately compensated if the case is unsuccessful; but the attorney is assured of receiving a market rate on successful conclusion of the case. Such retainer agreements are appropriate. See McKenzie Construction Inc., v. Maynard, 823 F.2d 43, 45 (3rd Cir. 1987) (fee that was contingent on judgment or settlement was upheld even where the hourly rate converted to $790 per hour). See also, Venegas v. Mitchell, 495 U.S. 82 (1990).

If attorneys could not be assured of being paid market rates when successful, they could not afford to take these difficult cases.

The Circuit's error on fees and costs in this case is compounded by its apparent approval of the District Court's order that Saulpaughs' counsel return all monies the clients advanced on fees and costs by deducting these monies from the fee and cost award irrespective of whether the fee and cost award covers the minimal fees and costs due under the retainer agreement. This order violates this Court's ruling in Venegas v. Mitchell, supra - (the fee shifting statutes do not limit the amount of fee due pursuant to the retainer.) The order violates this Court's ruling in Blanchard v. Bergeron, 489 U.S. 87 (1989) - (the nature of the retainer between the

plaintiff and his/her attorney does not limit the fee due pursuant to statute.)

Moreover the order violates ethical tenets. A lawyer cannot relieve the client of his/her responsibility to pay the costs of litigation. The Code of Professional Responsibility provides in DR 5-103:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

B. The Saulpaughs Are Entitled to a Lodestar Fee Award.

An award of attorney fees is computed by taking the "number of hours reasonably expended on litigation multiplied by a

reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058-59 (2nd Cir. 1989). The hours reasonably spent on a case times a market hourly rate, the lodestar, is presumed to be reasonable. Cunningham v. County of Los Angeles, 879 F.2d 473, 487 (9th Cir. 1988). It is an abuse of discretion to reduce the lodestar for reasons that are subsumed in the calculation of reasonable hours. Id. at 487-88 (relying on insufficient documentation and mediocre performance to reduce the lodestar was an abuse of discretion as they are already subsumed in the lodestar determination; it was also an abuse of discretion to adjust downward for what was seen as modest results as this was also a double penalty).

The lodestar may be adjusted downward only if the success in the case is limited and the unsuccessful claims were wholly unrelated to the successful claims. Hensley v. Eckerhart, supra, at 434-37 (1983). None of these factors are present in this case. Mrs. Saulpaugh prevailed on all issues tried to the District Court. She has successfully defended that judgment on appeal. Additionally, the Saulpaughs have won reinstatement on appeal of all of the Section 1983 claims (except one) and all of the severed, dismissed pendent state claims. Mrs. Saulpaugh's lost wages award is to be refigured with interest compounded.

C. There is No Bona Fide Issue of the Saulpaughs or Their Attorney Having Delayed this Case.

After the District Court dismissed the

Section 1983 claims and severed and dismissed with prejudice all of the pendent state claims, counsel for the parties and the District Court were faced with a litigation management problem. Counsel, with the approval of the District Court, sought to conserve the resources and time of the parties and the court and limit the litigation costs by litigating to final judgment the state civil service claims in State Supreme Court. Counsel thought this litigation could be dispositive of the state and federal claims. (A. 3016-3042)[4]

Between May 1986 and March 1989, the state civil service claims were litigated in State Supreme Court and the Appellate

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4. "___A" citations are to the appendix in the Second Circuit. "___a" citations are to the Appendix attached to this Petition.

Division Fourth Department. Delays of no fault of the Saulpaughs or their attorney occurred. The first assigned Supreme Court Justice retired in 1987; the case was transferred to another Justice who had to familiarize himself with the file and the previous rulings in the case. (A. 3016-3021)

In 1988, the MCH attorney, Kenneth Fisher, Esq. left county employment. Another attorney, Nira Kermisch, Esq. took over but she too then left county employment.[5] Ms. Kermisch was succeeded on the case by Teresa Johnson, Esq. in 1988 but she took time to familiarize herself with the file. Prosecution of the MCH appeal to the Fourth Department was delayed because Ms.

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5. Ms. Kermisch had the file initially and conducted a 50-h deposition of Mrs. Saulpaugh.

Johnson did not complete her submissions by the date to meet the term calendar. (A. 3023-3034)

The District Court was informed on an ongoing basis of the state court progress. The District Court granted extensions to complete discovery in the federal case as requested by counsel for all parties. (A. 3023-3034)

After the Fourth Department affirmed the Supreme Court decision that Mrs. Saulpaugh was fired in violation of civil service law, entitled to reinstatement and a hearing on back pay, the Saulpaughs' counsel informed the District Court, requested a new scheduling order on the federal case and assistance in settling. The court met with counsel about settlement on August 14, 1989. Ms. Johnson was directed by the court to respond to the Saulpaugh demand.

As of January 23, 1990, she had still not responded. The court was informed of this and of the intention of Saulpaughs' counsel to move for reconsideration of the Section 1983 rulings in light of the state judgment and for time to complete discovery if the case did not settle then. Ms. Johnson left county employment in July 1990 without ever responding to the settlement demand. (A. 3035-3040)

John Costello, Esq. succeeded Ms. Johnson as attorney for MCH; he took time to familiarize himself with the file. He was then replaced by the last attorney for MCH, T. Andrew Brown, Esq. During this same time, late summer, fall and winter 1990-1991, Saulpaugh counsel was also involved in summary judgment proceedings and trial preparation for Lambert v. The Genesee Hospital ____F.2d____(2nd Cir.

1993); the case was tried in the Western District before Judge Larimer in April, May and July of 1991. In August 1991, Saulpaugh counsel was diagnosed with a herniated disc; she was unable to sit, walk or stand without disabling pain; she was required to have bed rest and physical therapy for about a month and a half. Her schedule was limited when she returned to work and for months thereafter.

The court clerk issued an order to show cause in the case in October 1991 pursuant to Local Rule 18 because there had been no filings within the last 6 months. Saulpaugh counsel immediately filed an affidavit outlining the litigation management plan approved by the court, the need to complete discovery and obtain a ruling on reconsideration of the 1983 claims in light of the state court judgment; counsel

reminded the court of her recent, lengthy trial commitment and of her absence for injury. (A. 274, 275, 3041-42)

Saulpaugh counsel promptly moved for reconsideration of the 1983 claims in light of the state court judgment and for partial summary judgment on those claims. (A. 279-283) The District Court denied the motions. A summer 1992 trial date was set by the court.

However, in June 1992, the summer trial date was canceled by the court at the request of MCH counsel. Mr. Brown stated he wanted time to move for summary judgment on specified grounds. The motion was made but not on the specified grounds; the motion was denied; a new December trial date was set by the court. (A. 709-712, 880-882)

These uncontroverted facts about the

history of this case provide no factual basis for the District Court to have cut Saulpaughs' counsel's hourly rate from $150.00 or $185.00 to $110.00 per hour on the assertion that if the case had been tried sooner counsel's hourly rate would have been lower. See Appendix, 83a-90a, infra. This Court should be aware of another appeal pending before the Second Circuit, Sands v. Runyon, Docket No. 93-6164.[6] In Sands, as in Saulpaugh, the District Court cut counsel's market rate from $150.00, $185.00 and $200.00 per hour to $110.00 per hour suggesting that the case could have been tried sooner and the

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6. Second Circuit Judge VanGraafeiland's daughter, Anne VanGraafeiland, Esq., Assistant United States Attorney for the Western District of New York, was the lead, local attorney on Sands during most of the settlement discussions and the subsequent "damage hearing".

rate would have been lower if the case were tried sooner. See Appendix 90a-93a, infra.

Sands and Saulpaugh were pending before the District Court at the same time. The District Court in Sands withheld decision on motions for summary judgment made by all parties between July 1987 and January 1989 before referring the motions to the magistrate for decision. In the January 1989 referral, the District Court found that the case could not be scheduled for trial; this justified the appointment of the magistrate to make the decision. The magistrate granted summary judgment to Mr. Sands on his disability discrimination claims in December 1990; the District Court affirmed in April 1991. Over three and half years of the pendency of Sands is attributable to court consideration of

pending motions yet the District Court penalized plaintiff's counsel for "delay."[7] The District Court has in effect imposed a sanction on Saulpaugh counsel without basis in fact.

D. Application of Supreme Court and Circuit Precedent in Setting Attorney Fees for Prevailing Plaintiffs in Civil Rights Cases Dictates Reversal of the District Court's Attorney Fee Award

The District Court reduced the attorney fee award because it characterized Mrs. Saulpaugh's success as "limited." The law is otherwise. The Saulpaughs are entitled

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7. Counsel does not intend to criticize the court for the time necessary to consider the difficult issues presented in civil rights cases. Counsel is well aware of the pressures judges face from increasingly heavy civil and criminal dockets. However, these circumstances should not be used to penalize civil rights plaintiffs or their counsel.

to a full attorney fee awarded if they succeeded on a "significant issue of the litigation." Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 788 (1989), quoting Nadeau v. Helgemoe, 581 F.2d 275-278-79 (1st Cir. 1978); Fassett by and through Fassett v. Haekle, 936 F.2d 118, 122 (2nd Cir. 1991); DeFillipo v. Morizio, 759 F.2d 231, 235 (2nd Cir. 1985); Cowen v. Prudential Insurance Co., 935 F.2d 522, 524-25 (2nd Cir. 1991).

Mrs. Saulpaugh won a judgment below of sexual harassment and retaliation for complaining of sexual harassment. The success is not "limited" within the meaning of the civil rights attorney statutes.

It is reversible error for the trial

court to substitute its opinion[8] of hourly rates in place of the evidence in the record. Nanetti v. University of Ill. at Chicago, 944 F.2d 1416, 1418 (7th Cir. 1991). Saulpaughs' counsel was entitled to market rate fees. Blum v. Stenson, 465 U.S. 886, 895 (1984). Saulpaughs' attorney submitted affidavits of two employment

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8. A sanction under 28 U.S.C. Sec. 1927 for delay can be imposed by the court only when there is a finding of subjective bad faith delay. United States v. International Brotherhood of Teamsters, 948 F.2d 1338, 1345 (2nd Cir. 1991). As noted above, the attorneys for the parties with the approval of the court agreed to hold discovery in abeyance in the federal case pending litigation on the state civil service law claims. Counsel thought this issue could be dispositive of state and federal claims. Diligent efforts were made by the Saulpaughs' counsel to settle all claims after the State Supreme Court decision in her favor and then after the Appellate Division Fourth Department decision in her favor. When those efforts failed, discovery was concluded and the case was tried. These facts provide no basis to sanction counsel.

discrimination lawyers to establish the rates requested were/are market rates. MCH counsel did not controvert those affidavits.

The District Court's $110.00 per hour "average hourly rate" is plain error. Miele v. New York State Teamsters Conference Pension & Retirement Fund, 831 F.2d 407 (2nd Cir. 1987) (attorney fee award remanded where court did not base awarded rate on prevailing rates in the community); Gusman v. Unisys Corp., 986 F.2d 1146, 1149, 1150 (7th Cir. 1993) ("lawyers who fetch above average rates are presumptively entitled to them, rather than some rate devised by the court"; "the best measure of the cost of an attorney's time is what the attorney could earn from paying clients").

The law is also clear that the District

Court improperly excluded time spent on state claims on the attorney fee award. Such time can only be excluded if these claims were wholly unrelated to the successful claims. Hensley v. Eckerhart, supra at 434-37.

The claims arose from a common nucleus of operative fact and provided proof of a due process violation. Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447, 455 (6th Cir. 1986) (there was sufficient relationship between plaintiff's unaddressed constitutional claims and state claims to permit award of attorney fees); Reichman v. Bonsignore, Brignati & Mazzotta, 818 F.2d 278, 282-83 (2nd Cir. 1987) (prevailing plaintiff is entitled to attorney fees for time spent in mandatory administrative proceedings); Young v. Toia, 66 A.D.2d 377, 379-80 (4th Dept.

1979) (grant of attorney's fees was proper where it was based on a violation of state law which granted substantially the same rights as the federal statute); Thomasel v. Perales, 78 N.Y.2d 561 (1991) (award of attorneys fees is available when joined state claims have a common nucleus of operative fact.).

Nor is the characterization of some of the time entries as "inadequate" supported by the record. This Court and the Second Circuit have directed that attorney time records be read broadly. An attorney "is not required to record in great detail how each minute of his time was expended", Hensley v. Eckerhart, supra at 437. The Second Circuit has stated that time records need only "specify", for each attorney, the date, the hours expended, and the nature of the work done." New

York State Ass'n. for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2nd Cir. 1983). The District Judge previously found attorney time records like those he said were "inadequate" in this case to be appropriate. See J.G. v. Board of Education of Rochester City School Dist. 648 F. Supp. 1452, 1459 (W.D.N.Y. 1986) aff'd in relevant part, 830 F.2d 444 (2nd Cir. 1987). (A. 3108-09,3195-3298)

Finally, the Circuit's denial of attorney fees and costs to the Saulpaughs as prevailing parties on their appeal violates numerous holdings of this Court. A court has very limited discretion to deny a fee award to a prevailing plaintiff. See for example, Smith v. Robinson, 468 U.S. 992, 1006 (1984) - (a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would

render such an award unjust"); New York Gaslight Club, Inc. v. Carey, supra at 68. The Circuit gave no reason for the denial. There were certainly no special circumstances to justify the denial.

This Court should not permit the undermining of its authority governing the award of attorney fees in civil rights cases. If this court permits the initial decision on attorney fees in this case to stand, it suggests overruling some of that authority.

Likewise, if this Court permits the attorney fee decision in this case to stand, it suggests overruling clear case law requiring district judges to have basis for sanctioning attorneys. The precedents of this Court and the Second Circuit underscore that sanctions cannot be applied to discourage vigorous advoca-

cy. If the court permits district courts to deprive attorneys who have successfully tried cases of their fees, employment discrimination plaintiffs will be deprived of effective counsel. This issue is of exceptional importance. This Court should grant certiorari.

III. THE CIRCUIT ERRED IN PERMITTING THE DISTRICT COURT TO DENY MRS. SAULPAUGH, A PREVAILING PLAINTIFF, A PORTION OF HER "MAKE WHOLE" RELIEF (COMPOUND INTEREST ON HER LOST WAGES) BY CHARACTERIZING "DELAY" IN THE CASE AS SAULPAUGHS' FAULT WHEN THERE IS NO FACTUAL BASIS TO ATTRIBUTE ANY "DELAY" TO SAULPAUGHS OR THEIR ATTORNEY.

The Second Circuit has directed the District Court to recalculate the interest due on Mrs. Saulpaugh's lost wages judgment. However, it suggests that the District Court may refuse to award interest due if it finds the Saulpaughs delayed the case. Judge VanGraafeiland in

a separate opinion urges the District Court to deny interest for a number of years because of what he characterizes as case inactivity.

The Saulpaughs are not fairly blamed for the history of this case. The District Court's severance of the state and federal claims created a litigation nightmare. The Second Circuit has now ruled that the severance and dismissal of the state claims was error.

Counsel for the parties with the approval of the court agreed on a litigation plan that they thought would best utilize the time and resources of the parties and of the court by litigating the state civil service claims which could be dispositive. That decision was correct. The final state court judgment on the state civil service claims will assist the District

Court in ruling on the Section 1983 due process property interest claim reinstated by the Second Circuit.

MCH using five different attorneys on this case resulted not only in loss of time but failure to follow through in both settlement negotiations and motion practice. Obviously the Saulpaughs have no control over the attorney a public body assigns to defend a case.

The Saulpaughs' counsel diligently sought to settle this case throughout its pendency. This court certainly wants to encourage parties and their counsel to settle cases. The Saulpaughs should not be penalized for their repeated efforts to try to settle[9] or for the failure of MCH

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9. The Saulpaughs accepted the district court's recommendation to settle in June 1992 for $50,000.00. (A. 2931-32, 3044).

attorneys to follow up on settlement demands as directed by the District Court. These issues are of exceptional importance. This Court should grant certiorari.

Respectfully submitted,

s/ Emmelyn Logan-Baldwin
Emmelyn Logan-Baldwin
Pro So
Attorney for Petitioners

Dated: December 29, 1993

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Continued...

MCH rejected the recommendation.

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# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 1687, 1827 - August Term, 1992

(Argued: June 21, 1993)
(Decided: August 27, 1993)

Docket No. 93-7122, - 7204

JEANNETTE SAULPAUGH and
GREGORY M. SAULPAUGH,

Plaintiffs-Appellants,

-v-

MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, JR., Individually and as Executive Administrator,

Defendants-Appellees.

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Before:

NEWMAN, Chief Judge,
VAN GRAAFEILAND, and ALTIMARI,
Circuit Judges

Appeal from judgment entered in United States District Court for the Western District of New York (Telesca, J.), dis-

missing claims under 42 U.S.C. §1983 (1988) and New York common law, and finding for plaintiff following a bench trial on her claim under Title VII of the Civil Rights Act of 1964. Defendants cross-appeal to challenge holding that they violated Title VII.

Affirmed, in part, vacated and remanded, in part.

Chief Judge Newman and Judge Van Graafeiland both concur in separate opinions.

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EMMELYN LOGAN-BALDWIN, Rochester, N.Y., for Plaintiffs-Appellants.

T. ANDREW BROWN, Rochester, N.Y. (Charles S. Turner, County Attorney, Rochester, N.Y., of counsel), for Defendants-Appellees and Cross-Appellants.

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ALTIMARI, Circuit Judge:

Plaintiff-appellant Jeannette Saulpaugh appeals from a judgment entered in United

States District Court for the Western District of New York (Michael A. Telesca, Judge), following a bench trial on her claims asserted pursuant to Title VII of the Civil Rights Act of 1964. The district court held defendants liable under Title VII, finding that Saulpaugh had been both sexually harassed and discharged in retaliation for complaining about this harassment. In its calculation of damages and attorneys' fees, the district court did not award the full measure of damages sought.

On appeal, Saulpaugh first challenges the district court's dismissal of her claims under 42 U.S.C. §1983. Saulpaugh and her husband further challenge the district court's dismissal of their claims under New York common law. Finally, Saulpaugh contends that the district court miscalculated in awarding damages and attorneys'

fees. Specifically, Saulpaugh argues that the district court: (1) erred in excluding salary for her period of disability from its award of back pay; (2) erred in excluding the value of lost employer retirement contributions that Saulpaugh's expert calculated she had lost; (3) abused its discretion by failing to compound the interest that it awarded her; (4) abused its discretion by failing to award Saulpaugh the equitable remedy of front pay; (5) abused its discretion in adjusting downward the number of attorney hours compensated; and (6) abused its discretion in reducing the hourly rate of attorney compensation below the prevailing market rate. Defendants cross-appeal to challenge the district court's determination that they violated Title VII, contending that the evidence does not support this conclusion.

For the reasons set forth below, we affirm that portion of the judgment of the district court finding defendants liable for violating Title VII, but vacate the district court's award of damages, and remand with instructions that the district court recalculate the damages using a compound rate of interest. In addition, we reverse that portion of the district court's judgment dismissing Saulpaugh's equal protection and due process claims asserted under 42 U.S.C. §1983 as well as the Saulpaughs' claims under New York common law, and remand for further deliberations in light of this opinion. Finally, we affirm the district court's dismissal of Saulpaughs' claim that defendants termination of her employment violated her rights under the First Amendment.

**BACKGROUND**

Saulpaugh began working at defendant-appellee Monroe Community Hospital (the "Hospital") on December 5, 1983 as the Executive Housekeeper. On September 28, 1984, Saulpaugh's immediate supervisor, defendant-appellee Yvon Rosemond called Saulpaugh into his office and handed her a letter of termination for "unsatisfactory performance." During the intervening nine month period, as more fully developed below, Saulpaugh was subjected to Rosemond's repeated acts of sexual harassment and retaliation.

Saulpaugh was making $17,510 a year as of the date of her dismissal. After Saulpaugh's termination, Rosemond reportedly called a nursing home where Saulpaugh had a job offer, and advised the nursing home that Saulpaugh had been fired for her poor performance. The nursing home subsequently rescinded its offer.

Saulpaugh was ultimately able to secure employment elsewhere, but at a lower salary and with fewer fringe benefits.

On December 23, 1985, Saulpaugh and her husband brought the instant suit against the Hospital, Rosemond, and Raymond Diehl, the Hospital's executive administrator. The Saulpaughs asserted claims under Title VII of the Civil Rights, 42 U.S.C. §1983, and various statutory and common law claims under New York law.

On May 14, 1986, the United States District Court for the Western District of New York (Telesca, J.), granted defendants' motion to dismiss the Section 1983 claims for failure to state a claim, and to sever all state claims. The district court reasoned, inter alia, that Saulpaugh's equal protection claim implicated the same facts as her Title VII claim, and, therefore, that her Section

1983 claim was impermissbly grounded solely on a violation of Title VII. The court also concluded that Saulpaugh had failed to assert a viable Section 1983 action for violation of due process, because the alleged abuses of authority were identical to actions which could have been carried out by a private employer. Finally, the district court concluded that in light of its dismissal of the Section 1983 claims, the issues surrounding the New York common law claims would predominate, and accordingly dismissed these claims without prejudice. The Saulpaughs subsequently filed their severed claims in state court. After some discovery on the remaining claims, counsel for both parties agreed to postpone discovery until Saulpaugh's civil service claim was determined. On March 10, 1989, the Appellate Division affirmed the decision of the New

York State Supreme Court, finding that defendants had unlawfully terminated Saulpaugh in violation of New York Civil Service Law.

After discovery was completed, a bench trial was held in December of 1992 on Saulpaugh's claim under Title VII. Saulpaugh testified at trial that almost immediately after being hired, she began to be sexually harassed by her supervisor, defendant-appellee Rosemond. In fact according to Saulpaugh, on her first day of work, Rosemond greeted Saulpaugh in the presence of other employees with "oh, here is my little rabbit." The most extreme example of Rosemond's harassment of Saulpaugh occurred on December 23, 1983. Saulpaugh recounted that on that day she was called into Rosemond's office after lunch and was asked to go to New York City with him. In response to her declining

this invitation, Rosemond stated "I thought you were a liberated woman....Well, haven't you heard about open marriages?" Saulpaugh asked Rosemond whether he was talking about "cheating here." Rosemond responded that it was not cheating "if one spouse turns their [sic] head."

Saulpaugh testified that after she complained to her secretary and another employee supervised by Rosemond about this incident, Rosemond called her to his office where he threatened and berated her. According to Saulpaugh, Rosemond informed her that only he could help her keep her job, for which she had been initially hired as a provisional civil service employee. Saulpaugh recounted at trial that Rosemond also warned her that "I hold the power of your job, if you do one more thing, I will fire you."

Notwithstanding this threat, Saulpaugh informed Rosemond's immediate supervisor, Loren Ranaletta, and Reva Riley, the Associate Administrator of Personal at the Hospital, of Rosemond's actions.

Saulpaugh testified at trial that after the incidents of harassment were made public, Rosemond began to retaliate against her by criticizing her performance. Conflicting evidence was introduced at trial regarding Saulpaugh's performance as Executive Housekeeper. Saulpaugh received a number of letters of commendation for her various efforts. However, there were also complaints, primarily but not exclusively lodged by Rosemond, regarding the cleanliness of different areas that Saulpaugh and her staff were responsible for cleaning. Saulpaugh maintained at trial that these complaints constituted retaliation on the

part of Rosemond.

Rosemond also allegedly retaliated by, among other things, making Saulpaugh punch a time clock, recording and replaying his conversations with Saulpaugh, making Saulpaugh personally inspect the morgue, which she had been promised would not be required, and refusing to approve her request for overtime pay. Saulpaugh complained about some of Rosemond's actions to Ranaletta. Ranaletta ordered Rosemond to discontinue those practices that Saulpaugh complained of. According to Saulpaugh, Rosemond was infuriated by the fact that she had complained to Ranaletta, and subsequently threatened Saulpaugh that if she ever did anything wrong she would be fired.

The record indicates that as Saulpaugh and Rosemond's interactions became more hostile, employees in charge of personnel

relations became more involved. When confronted by his supervisors, Rosemond denied having ever sexually harassed Saulpaugh. Instead, Rosemond portrayed his dispute with Saulpaugh as being a function of his complaints about her poor performance. Despite both sides' complaints, Rosemond continued to act as Saulpaugh's supervisor. Rosemond also continued to act in a manner that was considered by Saulpaugh to be sexually harassing. For example, Saulpaugh testified that Rosemond placed his arm around her waist on one occasion, purportedly in an effort to help seat her.

In addition to the acts of retaliation testified to by Saulpaugh, the district court heard the testimony of Delores Wise, the Executive Housekeeper whom Saulpaugh had replaced. Wise recounted how she had suffered advances made by Rosemond similar

to those described by Saulpaugh. According to Wise, Rosemond had repeatedly invited her both to his residence and to New York City, where he said he would "show her a good time." Wise testified that after she rejected Rosemond's repeated advances, he became very critical of her work. Wise indicated that she did not bring a complaint against Rosemond, because she suspected that no one would believe her, and instead she sought and obtained employment elsewhere.

At the conclusion of the trial the district court ruled in Saulpaugh's favor, finding that defendants had violated Title VII. Specifically, the court concluded that Rosemond had violated Title VII by sexually harassing Saulpaugh and retaliating against her for complaining about his conduct. The court also found that the Hospital and Diehl, the Hospital's execu-

tive administrator, condoned Rosemond's actions by not adequately investigating Saulpaugh's claims.

Saulpaugh was awarded $38,282.90 in damages for lost wages between September 28, 1984 and January 1, 1988. The district court excluded from its calculation lost wages after January 1, 1988, because as of that date Saulpaugh has been disabled. Additionally, the court did not include the value of employer retirement contributions, which Saulpaugh's expert calculated that she had lost. The court also calculated interest awarded on a non-compound basis. As a result, Saulpaugh was only awarded 7.22% interest on the total amount of damages. Finally, the district court declined to award Saulpaugh the equitable remedy of front pay.

In a decision and order dated Mach 16, 1993, the district court awarded

$85,304.88 of the claimed $157,259.43 in attorneys' fees and costs claimed. The court concluded that some time entries made by Saulpaugh's attorney were inadequate, and that some of the time claimed had not been reasonably expended. The court also employed a lower hourly rate than the established market rate. The court noted that the retainer agreement stated an hourly rate of $80. In addition, because of the delay in litigating the matter, the court looked to the average historic fees over the entire period of the litigation. On this basis, the district court concluded that $110 per hour was a reasonable rate.

Saulpaugh now appeals to challenge: (1) the district court's dismissal of her Section 1983 suit; (2) the district court's dismissal of her pendent state claims; (3) the district court's

calculation of damages; and (4) the district court calculation of attorneys' fees. Defendants cross-appeal and challenge the judgment of the district court, which found in favor of Saulpaugh on her Title VII claim.

**DISCUSSION**

I. Defendants Liability Under Title VII

Initially, this Court must deal with defendants' cross-claim that the district court erred in finding for Saulpaugh on her claims under Title VII. This contention could have been complicated by the Supreme Court's recent decision in St. Mary's Honor Center v. Hicks, No. 92-602, 1993 U.S. Lexis 4401 (June 25, 1993), which must be applied retroactively pursuant to Harper v. Virginia Dept. of Taxation, No. 91-882, 1993 U.S. Lexis 4454 (June 18, 1993). Under Hicks we would have been required to vacate the judgment

had the district court reached its conclusion that Saulpaugh was discharged in retaliation for engaging in a protected activity based solely on her showing that defendants proffered reason for their actions was false. The Court in Hicks emphasized that a showing by Title VII plaintiffs that their employer's justification was false does not compel a finding of liability. Even after so demonstrating, Title VII plaintiffs retain the ultimate burden of proving that an employer's action was prompted by an impermissible motive. Id. However, Hicks does not impact the instant case because Saulpaugh introduced a substantial amount of direct evidence indicating that Rosemond fired her in retaliation for complaining about his sexual overtures. The district court could and did find this evidence to be credible. Having carefully

weighed the evidence, the district court did not clearly err, as defendants contend, in finding that Saulpaugh had met her burden of proving that she had been subjected to a retaliatory action.

Section 704(a) of Title VII prohibits an employer from discriminating "against any of his employees...because [the employee] has opposed any practice made unlawful by this subchapter." 42 U.S.C. §2000e-3(a)(1988). We note that in the context of a discharge in retaliation for engaging in a protected activity, this Court had developed a test based on the framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973), see Kotcher v.Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59 (2d Cir. 1992); Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991), which has now been clarified by Hicks. In applying this test, the

district court first concluded that Saulpaugh had established a prima facie case,[1] because she demonstrated "participation in a protected activity known to the defendant, an employment action disadvantaging [her], and a causal connection between the protected activity and the adverse employment action." Kotcher, 957 F.2d at 64 (citations omitted). The court then properly heard and considered the defendants proffered non-discriminatory

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1. "A prima facie case consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a non-jury case; it is the evidence necessary to require [a] defendant to proceed with his case. Courts use [the] concept of "prima facie" case in two senses: (1) in [the] sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of [the] allegation he asserts; and (2) courts used "prima facie" to mean not only that plaintiff's evidence would reasonably allow [the] conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it." Black's Law Dictionary 1071 (5th ed. 1979) (citations omitted).

reason for their actions. See Johnson, 931 F.2d at 207. Because defendants presented evidence indicating that they had dismissed Saulpaugh due to her poor performance, the court appropriately evaluated whether this justification was merely pretextual, i.e., a pretext for improperly motivated action. See Kotcher, 957 F.2d at 64-65. The district court's finding that Saulpaugh performed well in her capacity as Executive Housekeeper, and that defendants' justification for her dismissal was pretextual, is amply supported by the record.

As noted above, had the district court stopped its analysis short of this point and reached its conclusion based simply on her demonstration that the defendants excuse was false, we would have been forced to vacate the judgment and remand in light of Hicks. In the instant case,

however, the district court credited Saulpaugh's testimony that Rosemond threatened to fire her if she complained further about his actions. Furthermore, the court intimated that Saulpaugh's credibility was bolstered by the testimony of Wise, the former Executive Housekeeper, who described a similar pattern of sexual harassment and retaliation. Saulpaugh in effect produced not one but two "smoking guns." Therefore, we find that Saulpaugh unquestionably satisfied her burden of proving that she was discharged in retaliation for complaining about Rosemond's harassment.

We emphasize that despite the dire warnings to the contrary, Justice Scalia soundly concluded that Hicks would not cause "[p]anic...[to] break out among the courts of appeals." 113 S.Ct. at 2750. We read Hicks as doing no more than reit-

erating the longstanding rule that despite shifting burdens of production, a plaintiff always shoulders the ultimate burden of proof. As carefully explained by Justice Scalia in Hicks, once a Title VII plaintiff has established his or her prima facie case, the burden of production shifts to the defendant to provide a non-discriminatory rationale for its action. Because of the presumption attached to the establishment of a prima facie case in this area of jurisprudence, the failure of a defendant to meet its burden of production would result in a directed verdict for the plaintiff. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1980). However, if a defendant carries its burden by producing a non-discriminatory motive, "the McDonnell Douglas framework-with its presumptions and burdens-is no longer relevant." Hicks,

113 S.Ct. at 2745. Instead, the question simply becomes whether the plaintiff has proven its case by a preponderance of the evidence. In some instances, as Justice Scalia notes, a plaintiff may meet this ultimate burden of proof by combining her proof of the elements constituting a prima facie case with evidence that defendant's proffered reasons for its acts were false. 113 S.Ct. at 2749. Justice Scalia emphasizes that a factfinder's disbelief of a defendant's proffered rationale may allow it to infer the ultimate fact of intentional discrimination in some cases. Id. We were not required to evaluate whether this was such a case, because Saulpaugh, in addition to demonstrating the falsity of defendants' rationale, produced direct evidence of defendants' discriminatory intent. Nevertheless, because of the ill-founded confusion that has surrounded

Hicks' pronouncements, we believe it important to emphasize that a Title VII plaintiff does not necessarily meet its burden of persuasion by convincing the factfinder that the employer's non-discriminatory explanation is not credible; rather, the trier of fact must find that the plaintiff has proven its explanation of discriminatory intent by a fair preponderance of the evidence. Id. A Title VII plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. Because Saulpaugh succeeded in doing both, the district court unquestionably was justified in finding that Saulpaugh had proven her case by a fair preponderance of the evidence.

Likewise, the district court correctly outlined and applied the legal standard for Saulpaugh's "quid pro quo" theory of sexual harassment. As the district court noted, "'[u]nder a quid pro quo theory, the plaintiff-employee must establish that she was denied an economic benefit either because of gender or because a sexual advance was made by a supervisor and rejected by her.'" (quoting Kotcher, 957 F.2d at 62). The district court then concluded that, "[a]fter carefully considering and evaluating the credibility of the witnesses' trial testimony, I have determined that plaintiff has established that her rejection of Rosemond's sexual advances resulted in the deprivation of a job benefit for which she was otherwise qualified, i.e., a fair evaluation of her work." Accordingly, the Hospital as Rosemond's employer was held strictly

liable for Rosemond's actions. See Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 9189). Essentially defendants are asking this Court to substitute our evaluation for that of the trier of fact. We decline this invitation.

II. Section 1983 Action

Saulpaugh next argues that the district court erred in dismissing her Section 1983 claim. According to Saulpaugh, her claims under Title VII and under Section 1983 were separate and distinct. The district court, relying on Day v. Wayne County Bd. of Auditors, 749 F.2d 1199 (6th Cir. 1984), concluded that Title VII provided Saulpaugh with her exclusive remedy, because her Section 1983 cause of action was based solely on a violation of Title VII. However, Saulpaugh contends that her claims under Section 1983 are grounded not

on Title VII but on defendants' violations of her rights under the First Amendment, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment. Because a Title VII plaintiff can assert claims under Section 1983 for violations of rights not exclusively protected by Title VII, we will discuss each alleged violation in turn.

As we noted in Carrero, "it has been assumed in this Circuit that a §1983 claim is not precluded by a concurrent Title VII claim, when the former is based on substantive rights distinct from Title VII." 890 F.2d at 576; see also Berl v. County of Westchester, 849 F.2d 712 (2d Cir. 1988) (remanding Section 1983 and Title VII action for trial). A plaintiff cannot use Section 1983 to gain perceived advantages not available to a Title VII claimant, see Day, 749 F.2d at 1204, but a

plaintiff can assert a claim under Section 1983 if some law other than Title VII is the source of the right alleged to have been denied. See Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1575-76 (5th Cir.), cert. denied, 493 U.S. 1019 (1989). In the instant case Saulpaugh couches her Section 1983 in terms of the First Amendment, the Equal Protection Clause, and the Due Process Clause. Therefore, if she has asserted cognizable violations of these Constitutional provisions, the district court's dismissal of these claims must be vacated and the case remanded to the district court.

Initially, we note that Saulpaugh has failed to state a claim under the First Amendment. According to the Supreme Court in Connick v. Myers, 461 U.S. 138, 147 (1983), "when an employee speaks not as a citizen upon matters of public concern,

but instead as an employee upon matters only of a personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Had Saulpaugh's complaints to her supervisors implicated system-wide discrimination they would have unquestionably involved a matter of "public concern." See Marshall v. Allen, 984 2d 787 (7th Cir. 1993) (allowing Section 1983 claim where plaintiff was discharged following his support of other employees who had filed suit for gender discrimination; Wilson v. UT Health Ctr., 973 F.2d 1263, 1266 (5th Cir. 1992) (upholding Section 1983 claim where plaintiff's complaints concerned the routine use of sexually

suggestive language by police officers toward all female officers as well as systemic instances of other forms of sexual harassment), cert. denied, 113 S. Ct. 1644 (1993); Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (in banc) (finding public interest where there was a "wholesale change in the highest police echelons allegedly only on a racial basis"), cert. denied, 111 S. Ct. 2796 (1991). Here, however, there has been no violation of the First Amendment, because Saulpaugh's complaints were "personal in nature and generally related to her own situation." Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir.) (holding that resident's complaints about aspects of residency program that negatively affected her did not implicate matters of public concern), cert. denied, 112 S. Ct. 657 (1991). In the instant

case there is no indication that the plaintiff "wanted to debate issues of sex discrimination," that her suit sought "relief against pervasive or systemic misconduct by a public agency or public officials," or that her suit was "part of an overall effort...to correct allegedly unlawful practices or bring them to public attention." Yatvin v. Madison Metro. School Dist., 840 F.2d 412, 420 (7th Cir. 1988) (holding that plaintiff had failed to state a claim for relief under Section 1983). Although evidence was subsequently uncovered that Rosemond had also sexually harassed a prior employee, Saulpaugh's complaints, like those of the plaintiffs in Ezekwo and Yatvin, were motivated by and dealt with her individual employment situation. See also Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir.), cert. denied, 105 S. Ct. (1984).

By contrast, Saulpaugh has properly grounded a Section 1983 claim on the Equal Protection Clause. This Court, like our sister circuits, has upheld a Section 1983 claim against a public official for improper sexual conduct toward an employee that created a hostile work environment. See Carrero, 890 F.2d at 577; see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1478-79 (3d Cir. 1990); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989); Headley v. Bacon, 828 F.2d 1272, 1274-75 (8th Cir. 1987); Bohen v. City of East Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986). Perhaps some public employers sexually harass both men and women, but until an employer has the audacity to advance such a defense, sexual harassment of women constitutes disparate treatment because of gender, and is actionable under Section 1983.

Likewise, Saulpaugh's assertions that defendants deprived her of both a property and a liberty interest without due process of law were sufficient to survive defendants' motion to dismiss. Saulpaugh was terminated on September 28, 1984, almost six months before the Supreme Court's decision in Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) was handed down. As this Court explained in Zinker v. Doty, 907 F.2d 357, 360-61 (2d Cir. 1990), cert. denied, 498 U.S. 1041 (1991), a pre-termination hearing in connection with a dismissal of a public employee was not required prior to Loudermill by the due process clause of the United States Constitution. Id. at 360-63. Nevertheless, if Saulpaugh's probationary status gives rise to a property interest, then her post-termination remedies may have been

constitutionally deficient at least as of the date of her termination. We leave this question for decision in the district court in the first instance, perhaps on motion for summary judgment unless factual issues require resolution by a jury.

As to Saulpaugh's liberty interest, it is unclear from her amended complaint and her affidavit in opposition to defendants' motion to dismiss exactly when the comments concerning her performance were made to a prospective employer. Paul v. Davis, 424 U.S. 693, 709 (1976) and its progeny makes clear that in order for public employees to assert cognizable violations of their liberty interest, the defamation complained of must occur "in the course of the termination of employment." See, e.g., Easton v. Sundram, 947 F.2d 1011, 1016 (2d Cir. 1991), cert. denied, 112 S. Ct. 1943

(1992); Neu v.Corcoran, 869 F.2d 662, 667 (2d Cir.), cert. denied, 493 U.S. 816 (198). If statements to prospective employers were made after Saulpaugh's termination, then that defamation was "merely a tort, cognizable at state law, but not a constitutional deprivation." Neu, 869 F.2d at 667. However, given the procedural context of this case, we must construe any disputed or unknown facts in Saulpaugh's favor. We therefore vacate the district court's dismissal of this claim and remand to the district court for a determination of whether Saulpaugh's right to liberty under the Due Process clause has been violated.

III. The State Claims

The district court dismissed the Saulpaughs' state claims primarily because it had already dismissed the claims asserted under Section 1983. Given our

reinstatement of most of these latter claims, we believe it appropriate to also reinstate the state claims asserted by the Saulpaughs. However, in so doing we recognize that arguments based on collateral estoppel or res judicata may be available to either side.

IV. Calculation of Title VII Damages

Saulpaugh next contends that the district court erred in calculating the damages it awarded her. Specifically, Saulpaugh argues that the district court: (1) erred in excluding salary for her period of disability from its award of back pay; (2) erred in excluding the value of lost employer retirement contributions; (3) abused its discretion by failing to compound the interest that it awarded her; and (4) abused its discretion by failing to award Saulpaugh the equitable remedy of front pay. We will address each of these

contentions in turn.

Given Saulpaugh's success on her claim for retaliatory discharge, she would ordinarily be entitled to an award of back pay from the date of her termination until the date of judgment. See Dunlap-McCuller v. The Riese Organization, 980 F.2d 153, 159 (2d Cir. 1992). The purpose of back pay is to "completely redress the economic injury the plaintiff has suffered as a result of discrimination." See Gutzwiller v. Feink, 860 F.2d 1317, 1333 (6th Cir. 1988); see also Sellers v. Delgado Community College, 839 F.2d 1132, 1126 (5h Cir. 1988) (holding that a back pay award should make injured parties whole by placing them in the position that they would have been "but for" the discrimination). This award should therefore consist of lost salary, including anticipated raises, and fringe

benefits. Id.

The district court nevertheless excluded form its award the differential in Saulpaugh's salary from 1988 on, because she has been disabled since that date, and would not have been able to work at the Hospital. Saulpaugh argues that as the wrongdoer, the Hospital should bear the risk of her injury. However, Saulpaugh is only entitled to losses suffered "as a result" of defendants' discrimination. See Gutzwiller, 860 F.2d at 1333. Because Saulpaugh would not have been entitled to her salary from the Hospital while disabled, her losses after 1988 were not the result of the discrimination that she suffered. See EEOC v. Independent Stove Co.,Inc., 754 F.Supp. 713, 721 (E.D. Mo. 1991) (awarding back pay from the date of discharge until date of disability). Likewise, Saulpaugh is not entitled to

retirement benefits, because her benefits would not have vested before she became disabled.

Title VII authorizes a district court to grant pre-judgment interest on a back pay award. See, e.g., Clarke v. Frank, 960 F.2d 1146, 1153-54 (2d Cir. 1992). Its purpose is to prevent an employer from attempting "to enjoy an interest-free loan for as long as it can delay paying out back wages." Id. at 1154 (citation omitted). Therefore, this Court has held that "it is ordinarily an abuse of discretion not to include pre-judgment interest in a back pay award." Id. (emphasis in original). Given that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded. For example, if the average interest rate from Saulpaugh's discharge until her award was

7.22% a year, not an unreasonable estimate, then a $1 loss in 1985 would be worth approximately $1.83 in the beginning of 1993. By awarding Saulpaugh the equivalent of only $1.07, the district court was not making her whole and was instead effectively giving the defendants an interest free loan except for one year's worth of interest. Because the district court did not make Saulpaugh whole, its failure to apply a compound rate of interest to its calculation of damages constituted an abuse of discretion. See Clarke, 960 F.2d at 1153. On remand, however, the district court may wish to deny interest for specific years if it concludes that a delay in the litigation was the result of dilatory tactics by the plaintiff. We leave this determination to the district court in the first instance.

Finally, the district court did not abuse its discretion in denying Saulpaugh the remedy of front pay. The award of front pay is discretionary, and where as here the district court makes a specific finding that an award of back pay was sufficient to make a plaintiff whole, no abuse of discretion can be found. Cf. Barbano v. Madison County, 922 F.2d 139, 147 (2d Cir. 1990) (holding that failure to award front pay, because the district court impliedly found that other relief was sufficient, did not constitute an abuse of discretion).

V. Reasonable Attorneys' Fees

Saulpaugh next argues that the district court erred in calculating reasonable attorneys' fees. The district court awarded $85,304.88 of the $157,259.43 in attorneys' fees and costs claimed. Saulpaugh argues that the district court

abused its discretion in adjusting downward the number of hours expended as well as reducing the rate of compensation. We disagree.

The calculation of reasonable attorneys fees is a factual issue whose resolution is committed to the discretion of the district court. See Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992). In determining the proper amount of attorneys' fees a district court must multiply "all reasonable hours expended" by "a reasonable hourly rate." Id. (citations omitted). The district court did just that.

In a written opinion the district court provided an extensive justification for its reduction of the hours claimed. The court concluded that some time entries were inadequate, particularly because they did not differentiate between time spent

on the state and federal cases, and that some time was not reasonably expended given the nature of Saulpaugh's suit. This factual determination is a reasonable one, and consequently we hold that the district court did not abuse its discretion in finding that some of the hours claimed were not reasonably expended. In any event, Saulpaugh's attorney may be entitled to a portion of these excluded fees at the conclusion of the further deliberations that we have ordered.

The court also employed a lower hourly rate than the established market rate for the time period in which the work was done. Saulpaugh's attorney presented evidence that the applicable market rate was at least $150 per hour until July 15, 1990, and $185 per hour thereafter. The court rejected this argument and chose

instead to employ a rate of $110 per hour. The court noted that the retainer agreement stated an hourly rate of $80, and that the delay in litigating the matter was what caused the market rate to approximately double. Consequently, the court looked instead to the retainer agreement as well as to an average of the historic fees over the period. It was on this basis that the district court concluded that $110 per hour was a reasonable rate. This determination was a sensible one.

Because this litigation spanned a number of years, it was appropriate for the court to calculate and apply an average historic market rate for the period in question. See New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1153 (2d Cir. 1983). In making this calculation the district court was correct in first

looking to the retainer agreement as evidence of the appropriate historic market rate at the start of the litigation. See, e.g., Barcia v. Sitkin, 683 F.Supp. 353, 357 (S.D.N.Y. 1988) (noting that in determining a reasonable hourly rate the court should initially examine an attorney's existing schedule of fees). The district court then computed an average historic rate in order to avoid awarding Saulpaugh's attorney a windfall due to the protracted nature of the litigation. See Carey, 711 F.2d at 1153. We conclude that the district court did not abuse its discretion in so doing. We have examined Saulpaugh's remaining contentions and find them to be without merit.

CONCLUSION

Based on the foregoing, we affirm that portion of the judgment of the district court finding defendants liable for

violating Title VII, but vacate the district court's award of damages, and remand with instructions that the district court recalculate the damages using a compound rate of interest. However, we reverse that portion of the district court's judgment dismissing Saulpaugh's equal protection and due process claims asserted under 42 U.S.C. §1983 as well as the Saulpaughs' claims under New York common law, and remand for further deliberations in light of this opinion. Finally, we affirm the district court's dismissal of Saulpaugh's claim, asserted pursuant to Section 1983, that defendants termination of her employment violated her rights under the First Amendment.

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JON O. NEWMAN, Chief Judge, concurring:

I concur in Judge Altimari's opinion and write separately to amplify my views on

appellant's First Amendment claim. I believe that this Circuit's law concerning the First Amendment rights of public employees has evolved too hastily and too narrowly, but I am bound by the precedential force of Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir.), cert. denied, 112 S. Ct. 657 (1991).

With respect to the speech of public employees, the Supreme Court has distinguished between speech on matters of "public concern" and speech on matters of "personal interest." See Connick v. Myers, 461 U.S. 138, 147 (1983); See also Pickering v. Board of Education, 391 U.S. 563, 573 (1968). Adverse employment action taken because of speech in the "public concern" category is actionable under the First Amendment whenever "'the interests of the [employee], as a citizen, in commenting upon matters of public

concern' "outweigh" 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Connick, 461 at 142 (quoting Pickering, 391 U.S. at 568). Matters of "personal interest," however, require no First Amendment protection beyond whatever limited protection is available to those who are not publicly employed. Id. at 147.

This bifurcation has created the issue of whether the speech of a public employee must be placed in either the "public concern" or the "personal interest" categories, or whether, in an appropriate case, it may be placed in both categories, drawing First Amendment protection to the extent that the speech is a matter of "public concern." The Fifth Circuit has ruled that a public employee's speech may fall into both of the Connick categories.

In Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993), the Court said that the Supreme Court in Connick had "removed from First Amendment protection only that speech that is made only as an employee, and left intact protection for speech that is made both as an employee and as a citizen."[1] Id. at 1269 (emphasis in original). The Seventh Circuit can be understood to take a contrary view. It

---

1. Though some of the plaintiff's speech in Wilson concerned violations of Title VII directed at other persons, it is evident that the Fifth Circuit, properly in my view, regarded even her speech concerning the misconduct directed solely at herself as within the "public concern" category:

> We think that Wilson made her reports of sexual harassment both as a citizen and an employee. She contends that she started her reports after personally experiencing considerable harassment, and obviously had a stake as an individual citizen in having that conduct stopped....

Wilson, 973 F.2d at 1269-70 (emphasis added).



apparently believes that a public employee's speech must be placed either in the "public concern" category or the "private interest" category. See Marshall v. Allen, 984 F.2d 787, 794-97 (7th Cir. 1993) (public concern); Auriemma v. Rice, 910 F.2d 1449, 1459-61 (7th Cir. 1990) (in banc) (same), cert. denied, 111 S. Ct. 2796 (1991); Yatvin v. Madison Metropolitan School District, 840 F.2d 412, 419-20 (7th Cir. 1988) (personal interest); Altman v. Hurst, 734 F.2d 1240, 1243-44 (7th Cir.) (same), cert. denied, 469 U.S. 982 (1984).

I think the Fifth Circuit's reading of Connick is correct. In describing the category of "private interest" matters that do not receive First Amendment protection, the Supreme Court was careful to limit its ruling to "ordinary dismissals from government service which

violate no...applicable statute." Connick, 461 U.S. at 146. A dismissal in violation of Title VII is a matter of "public concern," and an employee who protests that her discharge violates Title VII is speaking about both a matter of "public concern" and a matter of "private interest."

Nevertheless, I am obliged to acknowledge that our Circuit has adopted the position taken by the Seventh Circuit, albeit without explicitly recognizing the two lines of conflicting authority, must less articulating a basis for preferring the Seventh Circuit's conclusion. See Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d at 780-81. Ezekwo ruled that a public employee's speech is to be placed either in the "public concern" or the "private interest" category and that the determination would be based on the

"primary aim" of the speech. Id. at 781. No explicit consideration was given to the contention that Ezekwo's speech, complaining of discrimination on the basis of gender, race, and national origin, see id. at 778, should have been deemed a matter of "public concern" simply because the discrimination "violate[d an] applicable statute," Connick, 461 U.S. at 146.

Though regretting our narrow view of First Amendment protection, I am bound by Ezekwo and therefore concur in the Court's opinion.

---

VAN GRAAFEILAND, Circuit Judge, concurring:

Because I agree with most of what Judge Altimari has written, I am reluctant to add to the Jarndyce v. Jarndyce aspect of this much overtried case by filing a third

appellate opinion. However, I have a few thoughts concerning this matter which I believe should be expressed.

At the outset, I must express a reservation concerning my colleague's blanket statement that sexual harassment of women constitutes disparate treatment because of gender. There is a widespread public misconception that only women are entitled to freedom from sexual harassment. This is not so. Women are entitled to no more equal protection under the Constitution than are men. According to a May 21, 1993 article in the New York Times, EEOC records show that in 1992, 968 sexual harassment claims were filed by men. Moreover, harassment is harassment regardless of whether it is caused by a member of the same or opposite sex. I therefore would be more comfortable treating harassment as a violation of

Title VII based on hostile work environment rather than section 1983. However, it is not my prerogative to overrule established precedent, and I therefore agree that the case must be returned to the district court for further proceedings. The several paragraphs that follow are intended to unravel somewhat the legal skein we now return to the busy district judge.

At the outset, I believe we can state now that the district court should not be required to resume jurisdiction of the state claims. Plaintiffs' 171-paragraph amended complaint contained nine causes of action, only the first two of which alleged federal wrongs, i.e., Title VII and section 1983. The remaining counts all involved state claims and requested, among other things, a declaration that the defendants' acts violated state statutory

and common law, together with injunctive relief in favor of Jeannette Saulpaugh and others similarly situated and a specific injunction prohibiting the making of false statements regarding Jeannette Saulpaugh's employment. The district court dismissed the state claims without prejudice on the ground that they would "substantially predominate in terms of proof, the scope of issues raised and comprehensiveness of the remedy sought."

Plaintiffs promptly turned to the state courts with a 117-paragraph complaint in which they repeated the claims that the district court had dismissed. New York Supreme Court Justice Robert Wagner summarized the contents of the state complaint as follows:

> In this action the plaintiffs allege nine causes of action which are, (1) Human Rights Law violations, (2) breach of employment contract, (3) libel and slander, (4) intentional

> infliction of mental distress, (5) prima facie tort, (6) loss of consortium, (7) violations of the New York Civil Service Law, local Civil Service Commission rules, (8) violation of the New York State Constitution, and (9) [improperly designated 10] violations of Monroe Community Hospital disciplinary rules.

Justice Wagner then granted the defense motion to dismiss the claims for breach of contract, libel and slander, emotional distress, prima facie tort, violation of the New York State Constitution, and violation of the Hospital's disciplinary rules. No appeal was taken from these dismissals.

Justice Wagner converted the claim for violation of the New York Civil Service Law and the Monroe County Civil Service Commission rules into an Article 78 proceeding under New York law. Thereafter, New York Supreme Court Justice Harold Galloway granted plaintiffs' motion for partial summary judgment based on a

violation of Monroe County Civil Service Commission Rule XVI, which provides that a probationary employee such as Saulpaugh is entitled to a minimum eight-week probationary term. On the basis of this determination, Justice Galloway held that Saulpaugh was entitled to be reinstated for a period of five weeks, i.e., the equivalent of the remainder of her eight-week probationary period that followed her discharge. Upon appeal, the Appellate Division Fourth Department held that, because a probationary employee was entitled to only a two-week minimum notice of termination, Saulpaugh was entitled to be reinstated for only two weeks. 148 A.D.2d 928 (4th Dep't 1989). The state courts did not rule on Saulpaugh's federal constitutional claims. They did, however, rule on Saulpaugh's state claims. As to the latter, appellants have had their day

in court.

I believe that the district court did not abuse its discretion in declining to exercise pendant jurisdiction over the state claims. See United Mine Workers v.Gibbs, 383 U.S. 715, 726 (1966); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 348-50 (1988); Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 373 (1978); Gentile v. Wallen, 562 F.2d 193, 198 (2d Cir. 1977). Assuming only for the sake of argument that there was an abuse of discretion, appellants have spent three years in litigating their state court claims and should not now be permitted to relitigate them in federal court. It goes without saying that, if appellants had been more successful in their state court litigation, they would oppose any claim that the district court abused its discretion in refusing to exercise pendant

jurisdiction.

I believe that Saulpaugh's claim of a violation of her liberty interest, based upon hearsay testimony concerning statements allegedly made to the Hurlbut Nursing Home, see, supra, at 20-21, also can be disposed of now. On this point, I am enlightened by that portion of Saulpaugh's cause of action for alleged libel and slander, which is the state equivalent of her federal liberty interest claim. Exhibit F, attached to and made a part of plaintiffs' state complaint, is an "EMPLOYEE REFERENCE INQUIRY" from Hurlbut Nursing Home, dated October 5, 1984 and directed to Monroe County Hospital. The INQUIRY, which stated that Jeannette Saulpaugh "has applied to us for a position," contained numerous blank squares in which the Hospital "as a former employer" was requested to check its response to

various inquiries concerning Saulpaugh's work as an employee. The only block that the Hospital checked dealt with "Absenteeism," the response to which could be "High," "Average", or "Low." The third cause of action in the state complaint alleges in part that the defendants:

> maliciously spoke and published of and concerning plaintiff Jeannette Saulpaugh, the following false and defamatory words:
>
> > A written employment reference falsely stating that plaintiff Jeannette Saulpaugh's attendance had only been average. A copy is attached as Exhibit F.
>
> The words published by the defendants were published with the intent to injure plaintiff Jeannette Saulpaugh in her profession, reputation and standing in the community. The words were and are wholly false.

I quote this allegation not to demonstrate its speciousness, but to demonstrate that, as of October 5, 1984, one week after Saulpaugh's employment was terminated, Hurlbut Nursing Home still

considered her an applicant for employment and was seeking information from the Hospital as a "former employer." Accepting as true Saulpaugh's hearsay testimony that Rosemond orally expressed to Hurlbut his dissatisfaction with her work, such statement could not be considered a constitutional violation of her liberty interest. See Paul v. Davis, 424 U.S. 693, 709 (1976); Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir.), cert. denied, 493 U.S. 816 (1989); Board of Regents v. Roth, 408 U.S. 564 (1972).

Finally, although I agree with my colleagues that the district court should give further consideration to the amount of the award for prejudgment interest, I want to make clear my belief that interest should not be awarded for those substantial periods of delay caused by the plaintiffs themselves. See Gibbs v. Hawaiian

Eugenia Corp., 966 F.2d 101, 109 (2d Cir. 1992); Cotter v. Eastern Conference of Teamsters Retirement Plan, 898 F.2d 424, 429 (4th Cir. 1990). In this respect, the following finding of the district court is most significant:

> This action has been pending since 1985 and for a period of five years virtually no action took place. It was not until October 28, 1991, when this Court issued an Order to Show Cause why the case should not be dismissed for failure to prosecute, that this cause eventually developed momentum.

The court added a footnote to the effect that plaintiffs' attorney spent 4.4 hours on th case in 1987, 5.9 hours in 1988, 2.3 hours in 1989, 27 minutes in 1990, and 11.9 hours in 1991.

I do not believe my colleagues intend that plaintiffs should be awarded prejudgment interest for this period of time. If they do, I respectfully disagree.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7 day of October, one thousand nine hundred and ninety-three.

JEANNETTE SAULPAUGH and
GREGORY SAULPAUGH,

Plaintiffs-Appellants,

-v.- DOCKET NUMBERS: 93-7122L
93-7204

MONROE COMMUNITY HOSPITAL, YVON ROSEMOND, Individually and as Former Assistant Administrator of Patient Services and J. RAYMOND DIEHL, Jr., Individually and as Executive Administrator,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Plaintiffs-Appellants Jeannette Saulpaugh and Gregory Saulpaugh.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

By: /s/ Carolyn Clark Campbell
Chief Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

Each motion must be accompanied by a supporting affidavit

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SAULPAUGH

V

MONROE COMMUNITY HOSP

93-7266;93-7122L
93-7203XAP
Docket Number

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**NOTICE OF MOTION**
For Attorney Fees and Costs on Appeal

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of case)

Emmelyn Logan-Baldwin, Esq., Suite 400 Century Row, 171 State Street
Rochester, New York 14614
716-232-2292

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

T. Andrew Brown, Esq., Deputy County Attorney, Monroe County Office Building
39 West Main Street
Rochester, New York 14614
716-428-3210

Has Consent of opposing counsel:

A. been sought? [x] Yes [ ] No

B. been obtained? [ ] Yes [x ] No

Has service been effected? [x] Yes [ ] No
Is oral argument desired? [x] Yes [ ] No
(Substantive motions only)

Requested Return Date: To be set by Court
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order [x] Yes [ ] No
B. by firm date of argument notice? [x] Yes [ ] No
C. If Yes, enter date: June 21, 1993

**EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL -**
Not Applicable

Has request for relief been made below? [ ] Yes [ ] No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?
[ ] Yes [ ] No

Judge or agency whose order is being appealed:

The Hon. Michael A. Telesca, Chief Judge
U.S. District Court for the Western District of New York

Brief statement of the relief requested:

See attached.

Complete Page 2 of this Form

By: (Signature of attorney)

/s/Emmelyn Logan-Baldwin
Signed name must be printed beneath

Emmelyn Logan-Baldwin

Appearing for: (Name of party)

Jeannette Saulpaugh and
Gregory M. Saulpaugh

Appellant or Petitioner:
[x] Plaintiff [ ] Defendant
Apellee or Respondent
[ ] Plaintiff [ ] Defendant

Date

September 8, 1993

ORDER

Kindly leave this space blank

**IT IS HEREBY ORDERED that the motion be and it hereby is denied**

/s/Jon O. Newman
/s/Ellsworth A. VanGraafeiland
/s/Frank X. Altimari
Circuit Judge

/s/October 15, 1993
Date

Filed October 15, 1993

United States Court of Appeals
Elaine B. Goldsmith, Clerk
Second Circuit

Previous requests for similar relief and disposition:

See attached.

Statement of the issue(s) presented by this motion:

See attached.

Brief statement of the facts (with page references to the moving papers):

See attached.

Summary of the argument (with page references to the moving papers):

See attached.

**Brief statement of the relief requested:**

Plaintiffs-appellants (Saulpaughs), as prevailing parties within the meaning of the civil rights fee statutes, seek all of their reasonable attorney fees and costs on this appeal.

**Previous requests for similar relief and disposition:**

The Saulpaughs requested an award of all their reasonable attorney fees and costs on the judgment in Mrs. Saulpaugh's favor against the defendants-appellees (MCH) for sexual harassment and retaliation for complaining of sexual harassment. However, the District Court did not grant all of the fees and costs requested. While the Second Circuit affirmed that part of the decision, the Second Circuit's remand to the District Court for further proceedings on causes of action that the District Court originally dismissed should result in the award of more attorney fees and costs to the Saulpaughs. They are requesting this Court reconsider the attorney fee portion of its decision.

**Statement of the issue(s) presented by this motion:**

Should the Saulpaughs who have succeeded on appeal in affirming the Title VII judgment in Mrs. Saulpaugh's favor, in obtaining a recalculation of Mrs. Saulpaugh's lost wages to include compound interest, and in reversing dismissal of all of their Section 1983 claims (except one) and all of their pendent state claims be awarded all of their reasonable attor-

ney fees and costs on appeal?

**Brief statement of the facts (with page references to the moving papers):**

The Saulpaughs appealed denial to Mrs. Saulpaugh of "make whole" relief upon the District Court's finding that she had been sexually harassed and retaliated against for complaining of sexual harassment in violation of Title VII. They sought reinstatement of Section 1983 and New York State statutory and common law claims which the District Court dismissed on the merits and/or refused to entertain pendent jurisdiction, pre-trial. MCH cross appealed claiming the District Court erred in its liability decision. This court affirmed the Title VII liability decision in Mrs. Saulpaugh's favor, reinstated all of the Section 1983 claims except one, reinstated and rejoined all of the severed state claims and directed the District Court to recalculate Mrs. Saulpaugh's lost wages with compound interest. While affirming the District Court's attorney fee decision, this court's remand of the case for further proceedings should result in a re-calculation of Mrs. Saulpaugh's reasonable attorney fees and costs for time and expenses incurred on the reinstated federal and state claims. This court affirmed the lower court's denial of front pay, lost wages for any period after Mrs. Saulpaugh became disabled and any contribution to retirement because she had not vested before becoming disabled. See attorney affidavit, paragraph 3.

**Summary of the argument (with page references to the moving papers):**

The Saulpaughs are prevailing parties on appeal and are entitled to a full award of all of their reasonable attorney fees and costs. They have not only established themselves as prevailing parties because they successfully defended the favorable Title VII judgment but they have established themselves as prevailing parties on appeal by obtaining reversal on at least one significant legal claim. They in fact have succeeded in obtaining reversal of the court's dismissal of Section 1983 claims of violation of the equal protection clause, the due process clause (property interest), the due process clause (liberty interest) and pendent state claims - violation of the New York State Human Rights Law, state civil service law, libel and slander, loss of services, prima facie tort, intentional infliction of emotional harm, and breach of contract. See attorney affidavit, paragraphs 4 and 5.

5jselbafi

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| SAULPAUGH | AFFIDAVIT IN SUPPORT OF MOTION |
| V | FOR ATTORNEY FEES AND COSTS ON APPEAL |
| MONROE COMMUNITY HOSPITAL | |

Docket Nos. 93-7266;
93-7122L; 93-7203XAP

State of New York
County of Monroe SS:
City of Rochester

Emmelyn Logan-Baldwin being duly sworn according to law deposes and says:

1. I am the attorney for Jeannette Saulpaugh and Gregory M. Saulpaugh (Saulpaughs), appellants and cross-appellees on this appeal. This affidavit is submitted in support of the motion to award the Saulpaughs all of their reasonable attorney fees and costs as prevailing parties on this appeal.

Issue Presented by this Motion

2. The issue presented by this motion is whether the Saulpaughs who have succeeded on appeal in affirming the Title VII judgment in Mrs. Saulpaugh's favor, in obtaining a recalculation of Mrs. Saulpaugh's lost wages to include compound interest, and in reversing dismissal of all of their Section 1983 claims (except one) and all of their pendent state claims should be awarded all of their reasonable attorney fees and costs on appeal?

Brief Statement of the Facts

3. The Saulpaughs appealed the denial to Mrs. Saulpaugh of "make whole" relief upon the District Court's finding that she had been sexually harassed and retaliated against for complaining of sexual harassment in violation of Title VII. They sought reinstatement of Section 1983 and New York State statutory and

common law claims which the District Court dismissed on the merits and/or refused to entertain pendent jurisdiction, pre-trial. MCH cross appealed claiming the court erred in its liability decision. This court affirmed the Title VII liability decision in Mrs. Saulpaugh's favor, reinstated all of the Section 1983 claims except one, reinstated and rejoined all of the severed state claims and directed the District Court to recalculate Mrs. Saulpaugh's lost wages with compound interest. While affirming the District Court's attorney fee decision, this court's remand of the case for further proceedings should result in a re-calculation of Mrs. Saulpaugh's reasonable attorney fees and costs for time and expenses incurred on the

reinstated federal and state claims.[1] This court affirmed the lower court's denial of front pay, lost wages for any period after Mrs. Saulpaugh became disabled and any contribution to retirement because she had not vested before becoming disabled.

The Saulpaughs Are Prevailing Parties; They Are Entitled to An Award of All Reasonable Attorney Fees and Costs on this Appeal.

4. The Saulpaughs have successfully defended the judgment in their favor under Title VII. Additionally, they have succeeded on this appeal in obtaining reinstatement of all of their Section 1983 claims (except one)[2] and all of the dis-

---

1. The Saulpaughs are asking this Court to reconsider its attorney fee and cost decision.

2. The Saulpaughs are asking the Court to reconsider this portion of its decision.

missed and severed state claims. They have obtained a reversal of the District Court's denial of compound interest on her back pay award. Mr. Saulpaugh has been reinstated as a party.

5. The Saulpaughs are prevailing parties on appeal and are entitled to a full award of attorney fees and costs because they have not only successfully defended a favorable merits judgment below but they have gained reversal of significant legal claims on appeal. The Saulpaughs need only to have gained reversal on one significant legal claim or successfully defended the merit judgment to be prevailing parties and entitled to a full attorney fee and costs award on appeal.[1]

---

1. The Saulpaughs understand that their application for costs on appeal should be limited to the costs of reproducing the joint appendix, their initial brief and reply brief. They understand that their

The Saulpaughs' Attorney is Entitled to a "Lodestar Award.

6. I am entitled to a fee based on the number of hours reasonably expended on appeal multiplied by a market hourly rate. My subordinate personnel are entitled to be compensated using the same formula. See brief submitted herewith.

7. I have been assisted on this appeal by one law clerk, Karen Bellaire, a May 1993 graduate of the University of Buffalo

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Continued...

Bill of Costs on appeal is submitted separately from the attorney fee motion. They have done so. The Saulpaughs understand that other substantial costs on appeal such as costs of the trial transcript, pre-argument conference call expense, other long distance expense, other copying expenses, Westlaw research expense, express delivery costs, fax and postage expenses, hotel and travel expenses incidental to arguing the appeal should be sought on application to the District Court. The Saulpaughs expressly reserve their rights to obtain reimbursement from MCH of all costs reasonably incurred in the prosecution of this appeal.

Law School and by paralegals, Janine Burns and Mary Morse. I and all persons assisting me on this appeal have maintained contemporaneous, detailed time records. Copies of these records are attached as Exhibit A.

8. I or persons assisting me have reasonably spent the following time on this appeal:

Emmelyn Logan-Baldwin

2/3/93-9/9/93 - 191.5 hours

Law Clerk Time - Bellaire

2/8/93-9/2/93 - 161.9 hours

Paralegal Time - Burns

4/10/93-5/23/93 - 53 hours

Paralegal Time - Morse

2/3/93-2/8/93 - 1.35 hours

9. My office billing rate from the time this appeal was noticed on February 4, 1993 to March 3, 1993 was $185.00 per

hour. Since March 3, 1993 my office billing rate has been $200.00 per hour. The billing rate for Law Clerks from February 4, 1993 to March 3, 1993 was $65.00 per hour and from March 3, 1993 is $75.00 per hour. The billing rate for Paralegals from February 4, 1993 to March 3, 1993 was $35.00 per hour and from March 3, 1993 to date is $45.00 per hour. I informed MCH counsel by letter of April 9, 1993 of my new billing rates and that "All future attorney fee applications will reflect these changes." See Exhibit B attached hereto and made a part hereof.

10. My hourly rates are market rates for attorneys of my background and experience in the Rochester area. The record contains affidavits of two plaintiff's employment discrimination lawyers, Lonny Dolin, Esq., a partner at Harris, Beach and Wilcox in Rochester, New York, and

William Price, Esq., a single practitioner in Buffalo, New York. (A. 3053 - 3060) Mr. Price's rate has increased to $200.00 per hour. See his subsequent affidavit submitted in Sands v. Runyon, et al, attached hereto and made a part hereof as Exhibit C.

11. District Judge David G. Larimer held that rates in the range of those I, Mr. Price and Ms. Dolin charge are market rates for experienced attorneys in the Rochester area when he reviewed the affidavits of John J. Keigher, Esq. and Louis D'Amanda, Esq. and set attorney fees for Monroe Legal Assistance attorneys in 1991. See brief submitted herewith.

12. I am a 1962 graduate of Duke University. I am a 1965 graduate of the University of Virginia School of Law. I am a member of the bars of the State of New York, Virginia and the District of

Columbia. I have practiced law continuously since 1965, first in Washington, D.C. and thereafter in Rochester, New York.

13. A summary of my practice and a discussion of some of the cases I have handled are contained in the joint appendix, A. 2935-2939.

14. My fee in this case should be calculated as follows:

Logan-Baldwin Time

2/3/93-3/1/93 - 9.25 hours at $185.00= $ 1,711.25

3/3/93-9/9/93 - 182.25 hours at $200.00= $ 36,450.00

Law Clerk-Karen Bellaire

2/8/93-2/15/93 - 13.7 hours at $65.00= $ 890.50

3/4/93-9/2/93 - 148.2 hours at $75.00= $ 11,115.00

Paralegal-Janine Burns

4/10/93-5/23/93 - 53 hours at $45.00= $ 2,385.00

Paralegal-Mary Morse

2/3/93-2/8/93 - 1.35 hours at $35.00= $ 47.25

Grand Total - $ 52,599.00

There is No Basis to Adjust the Lodestar Downward.

15. While the District Court adjusted the lodestar downward for what it labeled "delay" attributable to the Saulpaughs (and this Court considered it had discretion to do so), there is no basis in fact for that finding. This court has the responsibility to find the facts on this application.

16. The record is uncontroverted that after the District Court severed all of the state claims from the federal claims and the Saulpaughs refiled the state

claims in New York State Supreme Court, counsel for all parties with the approval of the District Court agreed on a litigation management plan. Completion of discovery on all claims was postponed pending litigation of Mrs. Saulpaugh's state civil service law claims through all appeals.[1] The attorneys for all parties thought a resolution of the state civil service claims could be dispositive of the claims in both federal and state court. (A. 3016-3042)

17. During 1986 and 1987, State Supreme

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1. Kenneth R. Fisher, Esq. assumed the MCH representation after Nira Kermisch, Esq., took a 50-h statement from plaintiff. Mr. Fisher was named United States Magistrate for the Western District of New York in April 1988.

Court judges[1] considered MCH attacks on the civil service law and other state claims. The District Court at the request of all counsel extended the discovery time in the federal case. (A. 3016-3021)

18. When MCH was dissatisfied with the State Supreme Court's sustaining Mrs. Saulpaugh's state civil service law claims and granting her partial summary judgment, it appealed to the Appellate Division Fourth Department in late 1987. Submission of that appeal was delayed when Mr. Fisher left the employment of the county attorney. He was replaced by Nira Kermisch, Esq. but she then left the county

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1. The state claims were assigned initially to Judge Wagner. After he retired in May 1987, the case was reassigned to Judge Galloway. Not only did the reassignment process take some time but Judge Galloway needed to familiarize himself with the file and Judge Wagner's prior rulings.

attorney. Teresa D. Johnson, Esq. replaced Ms. Kermisch. Since I had already obtained partial summary judgment on the state civil service claims, I asked the District Judge to assist in trying to settle all state and federal claims. The District Court accommodated my request. The District Court granted a further, joint request of all counsel to extend the discovery time in federal court. (A. 3023-3034)

19. When the Appellate Division Fourth Department affirmed the partial summary judgment in Mrs. Saulpaugh's favor in March 1989, I promptly moved, with the consent of opposing counsel, for a new scheduling order on the federal case; I asked the court's further assistance in settling the case. The Court accommodated my request and met with me and opposing counsel on August 14, 1989. Opposing

counsel, Ms. Johnson, was directed by the Court to respond to Mrs. Saulpaugh's settlement demand but as of January 23, 1990, the Court and I were still awaiting her response. I advised the Court that if MCH were to advise it would not settle the case at that time, I would

> "...move for you to reconsider your decision on plaintiff's 1983 claims in light of the State court decision and for other relief. Discovery in this case was postponed and delayed pending the outcome of the State court proceedings.
>
> If this case cannot be settled or disposed of, we need a new scheduling order. There is substantial discovery that has been postponed." (A. 3035-3040)

20. Ms. Johnson left the county attorney's office in or about July 1990 without ever having responded to Mrs. Saulpaugh's settlement demand as directed by the Court.

21. Another county attorney, John Costello, Esq. then assumed this file. He was in the process of getting up to speed

with the file after Ms. Johnson left. During late summer, fall and winter 1990, my office calender was very full with summary judgment proceedings and trial preparation for Lambert, et al v. The Genesee Hospital, et al,; the case was tried before Judge Larimer in April, May and July of 1991. During this same time, the last MCH attorney, T. Andrew Brown, replaced Mr. Costello. In August 1991, I was diagnosed with a herniated disk; I was unable to sit, walk or stand without disabling pain; I had to have bed rest and physical therapy for approximately a month and a half. When I was permitted to return to the office, I was required to limit the hours and my physical activity; I was a matter of months in the process of resuming my regular schedule and activities.

22. Since the federal case had no fil-

<u>ings</u> within six months, the Court clerk generated an order to show cause dated October 28, 1991 pursuant to Local Rule 18. I immediately responded with an affidavit outlining the holding of discovery in abeyance on consent pending the determination of the state civil service issue, my having previously advised the Court of the impact of the state court decision on the dismissed 1983 claims, my intervening trial commitment and my back injury problem. (A. 274, 275, 3041-3042)

23. I promptly moved for reconsideration of the dismissal of the 1983 claims and for partial summary judgment on the basis of the state court decision (A. 279 - 283)

24. In order to save the time and resources of all the parties and of the Court, I moved in August 1992 for the District Court to permit the trial of the

Title VII claims in state court with the state claims. I also requested that the Court reconsider its past decision to sever the state claims from the Title VII claims in light of additional Second Circuit authority on point. The District Court denied both motions. (A. 703 - 708,880 - 882)

25. Delay attributable to the Saulpaughs or me has never been a bona fide issue in this litigation. But there is now a pattern of the District Court cutting my hourly, market billing rate by suggesting delay. In,[1] Sands v. Runyon, et al, Docket No. 93-6164, (pending in this Court) filed

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1. I believe I am obligated to advise the court that Judge VanGraafeiland's daughter, Anne VanGraafeiland, Esq., Assistant United States Attorney for the Western District of New York, was the lead, local attorney on Sands during most of the settlement discussions and the subsequent "damage hearing."

in the same time period in the District Court as Saulpaugh, the District Court delayed decision on summary judgment motions filed by all parties for 45 months (over 3 1/2 years). It sat on the motions between July 1987 and January 1989 before referring the motions to the Magistrate for decision; in making the referral, the District Court found that the case had not been scheduled for trail and could not be scheduled for trial, "...despite the mandate of 42 U.S.C. Sec. 2000e-5(f)(5)..." and that the statutory "...mandate and inability to schedule said case for trail constituting such exceptional condition as justifies..." the appointment of a special master.

26. The Magistrate granted summary judgment to Sands on his disability discrimination claims in December 1990; the District Court affirmed in April 1991.

27. The District Court wanted the parties to settle the damage issues. Although Sands and I tried diligently to do so, providing the Post Office with our expert's report, methodology and calculations, no settlement was reached because the Post Office never calculated Sands' back pay award using the correct hourly rates for the computation, never calculated the back pay award compounding interest that was due and never calculated the award without making improper deductions for Medicare, Social Security and retirement. It was not until after the Court, following a "damage hearing," ordered the Post Office to re-calculate the back pay due Mr. Sands, that the Post Office corrected the fundamental errors. Yet the District Court used the recalcitrant tactics of the Post Office and the length of the pendency of the case before it

(none of which was attributable to any conduct of Sands or me), as basis to reduce my hourly rate, just as the Court had previously done in Saulpaugh.

28. The United States Supreme Court and this Court have developed a large body of law governing the award of attorney fees in civil rights cases. Were this Court to permit its initial decision on attorney fees in this case to stand, it suggests overruling the clear authority on sufficiency of attorney time entries, stating clear basis for the calculation of the fee in the District Court decision, and calculating the lodestar by multiplying the hours reasonably expended by the market rate for attorneys of like experience.

29. Likewise, the United States Supreme Court and this Circuit have developed a clear body of law on the circumstances in which a District Court may sanction attor-

neys. The District Court has in effect sanctioned me without ever having any basis in fact. This Court would not want to undermine the existing case law requiring the District Court to have appropriate motives and criteria for sanctioning attorneys. Vigorous advocacy on behalf of a client should be encouraged. Nothing could be more destruction of such a goal than to permit the District Court to penalize the attorney by depriving the attorney of the fee earned after successful trial.

30. Certainly this Court wants to encourage attorneys to conserve the time and resources of the parties and of the Court by litigating all of the issues that can be litigated in one court and only once. Certainly this Court wants to encourage attorneys to try to settle cases where possible. These objectives are undermined

if the Court fails to grant the Saulpaughs a full attorney fee award at market rates for the work on this appeal.

/s/Emmelyn Logan-Baldwin
Emmelyn Logan-Baldwin

Sworn to before me this

9th of September 1993.

/s/Mary E. Morse

Commissioner of Deeds
My Commission Expires 4/30/95